

Sharing insights

News Alert
24 May 2013



Tax holiday under section 10B is undertaking-specific and available post slump sale as change in ownership cannot be construed as reconstruction

In brief

In a recent decision in the case of Woco Motherson Elastomer Ltd. ¹ (the assessee), the Delhi Income-tax Appellate Tribunal (the Tribunal) has held that tax holiday benefit under section 10B of the Income-tax Act 1961 (the Act) cannot be denied when whole of the eligible undertaking is transferred pursuant to a slump sale, and that the benefit continues for the unexpired eligible period, as the undertaking existed in the same place, form and substance and carried on the same business before and after the slump sale.

Facts

- The assessee had purchased an existing 100% Export Oriented Unit (EOU) enjoying tax holiday under section 10B of the Act from M/s Motherson Sumi Systems Limited (MSSL) on slump sale basis during financial year 2004-05.
- The assessee claimed tax holiday benefit under section 10B of the Act on the EOU in its return of income.
- The assessing officer (AO) denied such benefit claimed by the assessee on the following grounds:

¹ Woco Motherson Elastomer Ltd. v. DCIT [TS-200-ITAT-2013 (Del)]

- The acquired unit was formed by splitting up or reconstruction of MSSL's existing business.
- Plant and machinery previously used were transferred to the assessee, which far exceeded the allowable limit and was in violation of section 10B of the Act.
- The assessee had made domestic sales from the EOU and therefore it was not a 100% EOU despite being registered as such.
- The Commissioner of Income-tax (Appeals) upheld the order of AO.

Issues

- Whether, on facts, the following requirements under section 10B of the Act of the Act have been fulfilled by the assessee to be eligible for claiming exemption under section 10B of the Act:
 - The industrial undertaking is not formed by splitting up or reconstruction of a business already in existence.
 - Industrial undertaking is not formed by transfer to a new business of machinery or plant previously used for any purpose.
 - The EOU made domestic sales of the goods produced by it and therefore is not a 100% EOU.

Assessee's contentions

- There was no splitting of business. The whole undertaking eligible for benefit under section 10B of the Act was taken over by the assessee.

- This view is supported by a board circular² which clarifies that tax benefit under section 10B of the Act will continue to be available in case of slump sale of a unit or undertaking.
- Other than change in ownership, there was no change in the structure of the undertaking.
- Section 10B(9) of the Act provided that:

Where during any previous year the ownership or beneficial interest in the undertaking is transferred by any means, the deduction under section 10B of the Act shall not be allowed to the assessee for the assessment year relevant to such previous year and the subsequent year.

- The above sub-section was omitted by the Finance Act, 2003 with effect from 1 April 2004 and therefore, with the omission of the said sub-section, legislative intent had been made clear that after 1 April 2004, exemption under section 10B of the Act will not be disallowed even in case of change of ownership of the undertaking.
- Reliance was placed by the assessee on decisions in Samsung India Software³ and in Heartland Delhi Transcription & Services⁴ which had similar facts and were decided in the assessee's favour.

Revenue authorities' contentions

- The business of the assessee was formed by splitting and reconstructing the business which was already in existence and carried on by MSSL.
- The plant and machinery previously used were transferred to the assessee.

² Board Circular No.178/84 of 2012 dated 17.1.2013 para 2(iv)

³ Samsung India Software Pvt. Ltd. v. ACIT, Bangalore Tribunal I.T.A./No.399/Bang./2012

⁴ Heartland Delhi Transcription & Services Pvt. Ltd, Delhi Tribunal I.T.A. Nos. 1551 to 1553/Del/2008.

Tribunal Ruling

- The Tribunal held that the whole undertaking, consisting of all assets and liabilities as a going concern, was acquired by the assessee. It was not a case where only a part of the plant and machinery or other assets belonging to an undertaking had been transferred.
- It cannot be said that the undertaking has been formed by splitting or reconstruction as the business was already in existence, on which deduction under section 10B of the Act had been claimed and allowed.
- Since the whole undertaking was transferred, it cannot be said that the assessee company carried the business with transferred machinery or plant previously used by another person.
- The Tribunal relied upon the Delhi Tribunal's decision in the case of Heartland Delhi Transcription & Services (supra) wherein deduction under section 10B of the Act had been allowed on similar facts from AY 2005-06, i.e. post-omission of sub-section 9 of section 10B of the Act, on the grounds that:

"The emphasis is on the undertaking, whose profits are to be computed which thereafter have to be deducted from the total income of the assessee. The words 'the assessee' means any assessee as the article 'the' is an indefinite article. Further, this provision also uses the words 'any undertaking' and not 'the assessee'. Therefore, this provision also lays emphasis on the undertaking and not the assessee."

- The Tribunal also relied upon the Bangalore Tribunal's decision of the in the case of Samsung India Software (supra) and held that *"mere organisation change is not a ground to disallow tax holiday under section 10B of the Act. The undertaking existed in the same place, form and substance and carried on the same business before and after the change in the legal character and form of the organisation. Formerly, it was a part of MSSL and presently it is an independent assessee. However, with the above change in organisational status, the same unit continued to function."*
- The AO's objection that some part of sale was affected in the domestic area did not disentitle the assessee for claiming deduction under section 10B of the Act unless the undertaking was deleted from the category of 100% EOU by the concerned department.

Conclusion

The Delhi Tribunal held that change in ownership a business or undertaking consequent to slump sale cannot be regarded as splitting up or reconstruction of the business for the purposes of section 10B of the Act.

This decision is relevant to entities which have undertakings enjoying tax holidays/deductions under various provisions of the Act which are pari-materia to Section 10B of the Act and which have undergone change of ownership, or may be subject to a restructuring involving transfer of such undertaking.

About PwC

PwC* helps organisations and individuals create the value they're looking for. We are a network of firms in 158 countries with more than 180,000 people who are committed to delivering quality in assurance, tax and advisory services.

PwC India refers to the network of PwC firms in India, having offices in: Ahmedabad, Bangalore, Chennai, Delhi NCR, Hyderabad, Kolkata, Mumbai and Pune. For more information about PwC India's service offerings, please visit www.pwc.in.

*PwC refers to PwC India and may sometimes refer to the PwC network. Each member firm is a separate legal entity. Please see www.pwc.com/structure for further details. Tell us what matters to you and find out more by visiting us at www.pwc.in.



Our offices

For private circulation only

<p>Ahmedabad President Plaza, 1st Floor Plot No 36 Opp Muktidham Derasar Thaltej Cross Road, SG Highway Ahmedabad, Gujarat 380054 Phone +91-79 3091 7000</p>	<p>Bangalore 6th Floor, Millenia Tower 'D' 1 & 2, Murphy Road, Ulsoor, Bangalore 560 008 Phone +91-80 4079 7000</p>	<p>Chennai 8th Floor, Prestige Palladium Bayan 129-140 Greams Road, Chennai 600 006, India Phone +91 44 4228 5000</p>	<p>Hyderabad #8-2-293/82/A/113A Road no. 36, Jubilee Hills, Hyderabad 500 034, Andhra Pradesh Phone +91-40 6624 6600</p>	<p>Kolkata 56 & 57, Block DN. Ground Floor, A- Wing Sector - V, Salt Lake. Kolkata - 700 091, West Bengal, India Telephone: +91-033 - 2357 9101/4400 1111 Fax: (91) 033 - 2357 2754</p>
<p>Mumbai PwC House, Plot No. 18A, Guru Nanak Road - (Station Road), Bandra (West), Mumbai - 400 050 Phone +91-22 6689 1000</p>	<p>Gurgaon Building No. 10, Tower - C 17th & 18th Floor, DLF Cyber City, Gurgaon Haryana -122002 Phone : +91-124 330 6000</p>	<p>Pune GF-02, Tower C, Panchshil Tech Park, Don Bosco School Road, Yerwada, Pune - 411 006 Phone +91-20 4100 4444</p>	<p>For more information contact us at, pwctr.knowledgemanagement@in.pwc.com</p>	

This publication has been prepared for general guidance on matters of interest only, and does not constitute professional advice. You should not act upon the information contained in this publication without obtaining specific professional advice. No representation or warranty (express or implied) is given as to the accuracy or completeness of the information contained in this publication, and, to the extent permitted by law, PwCPL, its members, employees and agents accept no liability, and disclaim all responsibility, for the consequences of you or anyone else acting, or refraining to act, in reliance on the information contained in this publication or for any decision based on it. Without prior permission of PwCPL, this publication may not be quoted in whole or in part or otherwise referred to in any documents.

©2013 PricewaterhouseCoopers. All rights reserved. "PwC", a registered trademark, refers to PricewaterhouseCoopers Private Limited (a limited company in India) or, as the context requires, other member firms of PricewaterhouseCoopers International Limited, each of which is a separate and independent legal entity.